

# San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

June 16, 2017

Heron Bay Homeowner Association  
c/o Alan Berger, Representative  
Law Offices of Alan Berger  
95 South Market Street, Suite 545  
San Jose, CA 95113

SUBJECT: Issuance of Violation Report /Complaint for the Imposition of Administrative Civil Penalties; Heron Bay Homeowners Association, (BCDC Enforcement File No. ER2014.015 and Permit File No. M1992.057.01)

Dear Mr. Berger,

As you know, there are BCDC permit violations that we have been unable to resolve with Heron Bay Homeowners Association ("HOA") at the Commission's staff level. On April 14, 2017, after not hearing from the HOA for several months, Commission staff sent you a letter providing notice that the Executive Director had terminated the opportunity to resolve the penalty portion of the enforcement matter using the standardized fine process and a formal enforcement proceeding would be commenced.

On May 19, 2017, in response to the April 14<sup>th</sup> letter, you submitted a third application for a second amendment to BCDC Permit No. M1992.057.01, to authorize the as-built public access after-the-fact and additional public access amenities. For the reasons set forth in my letter dated June 14, 2017 responding to the application, the application is incomplete for reasons that have previously been communicated to the HOA. Therefore, the application provides Commission staff no reason to reconsider our earlier standardized fine decision.

Therefore, as directed by the Executive Director, we are commencing a formal enforcement proceeding. The first step in this process is to issue the enclosed Violation Report/Complaint for the Imposition of Administrative Civil Penalties ("Violation Report/Complaint") that sets forth the Commission staff's allegations.

The Commission's law provides you with the opportunity to submit a "statement of defense" within 35 days of the date of mailing of the Report/Complaint, or **by no later than July 20, 2017**. Thereafter, the Enforcement Committee, a six-member subcommittee of the Commission, will hold an administrative hearing to consider the facts and determine whether it should recommend that the Commission issue a cease and desist and civil penalty order. The Enforcement Committee is scheduled to hold its public hearing in **August 2017**. The full

Commission will make the final determination whether to issue a cease and desist and civil penalty order after the Enforcement Committee's public hearing and after considering the Enforcement Committee's recommended enforcement decision.

I have enclosed the following documents: (1) the Violation Report/Complaint; (2) a Statement of Defense form; and (3) a copy of Chapter 13 of the Commission's regulations that govern the enforcement process. Please let me know if you would like me to email an electronic copy of the Statement of Defense form.

If you have any questions, please don't hesitate to contact me by phone at (415) 352-3668 or by email at [maggie.weber@bcdcc.ca.gov](mailto:maggie.weber@bcdcc.ca.gov).

Sincerely,

A handwritten signature in cursive script that reads "Maggie Weber".

MAGGIE WEBER  
Enforcement Analyst

MW/go

Enclosures

## Statement of Defense Form

### Enforcement Investigation ER2014.015

#### Heron Bay Homeowners Association

FAILURE (1) TO COMPLETE THIS FORM, (2) TO INCLUDE WITH THE COMPLETED FORM ALL DOCUMENTS, DECLARATIONS UNDER PENALTY OF PERJURY, AND OTHER EVIDENCE YOU WANT PLACED IN THE RECORD AND TO BE CONSIDERED BY THE COMMISSION, (3) TO LIST ANY WITNESSES WHOSE DECLARATION IS PART OF THE STAFF'S CASE AS IDENTIFIED IN THE VIOLATION REPORT THAT YOU WISH TO CROSS-EXAMINE, THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE WITNESS, AND THE INFORMATION YOU HOPE TO ELICIT BY CROSS-EXAMINATION, AND (4) TO RETURN THE COMPLETED FORM AND ALL INCLUDED MATERIALS TO THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION STAFF OR TO CONTACT **MAGGIE WEBER** OR **JOHN BOWERS** OF THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF BY JULY 20, 2017 MEANS THAT THE COMMISSION CAN REFUSE TO CONSIDER SUCH STATEMENTS AND EVIDENCE WHEN THE COMMISSION HEARS THIS MATTER.

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU, IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BE USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AN ATTORNEY BEFORE YOU COMPLETE THIS FORM OR OTHERWISE CONTACT THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF.

This form is enclosed with a violation report. The violation report indicates that you may be responsible for or in some way involved in either a violation of the Commission's laws, a Commission permit, or a Commission cease and desist order. The violation report summarizes what the possible violation involves, who may be responsible for it, where and when it occurred, if the Commission staff is proposing any civil penalty and, if so, how much, and other pertinent information concerning the possible violation.

This form requires you to respond to the alleged facts contained in the violation report, to raise any affirmative defenses that you believe apply, to request any cross-examination that you believe necessary, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the possible violation or may mitigate your responsibility. This form also requires you to enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps drawings, etc. and written declarations under penalty of perjury that you want the Commission to consider as part of this enforcement hearing. This form also requires you to identify by name any person whom you may want to cross-examine prior to the enforcement hearing on this matter, the area of knowledge that you want to cover in the cross-examination, the nature of the testimony that you hope to elicit, and the reasons that you believe other means of producing this evidence are unsatisfactory. Finally, if the staff is only proposing a civil penalty, i.e., no issuance of either a cease or desist order or a permit revocation order, this form allows you alternatively to pay the proposed fine without contesting the matter subject to ratification of the amount by the Commission.

IF YOU WANT TO CROSS-EXAMINE ANY PERSON ON WHOSE TESTIMONY THE STAFF HAS RELIED IN THE VIOLATION REPORT, YOU MUST COMPLETE PARAGRAPH SEVEN TO THIS STATEMENT OF DEFENSE FORM. THIS PARAGRAPH REQUIRES YOU TO SET OUT (1) THE NAME(S) OF THE PERSON(S) YOU WANT TO CROSS-EXAMINE, (2) REFERENCES TO ANY DOCUMENTS ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (3) THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (4) THE INFORMATION THAT YOU BELIEVE CAN BE ELICITED BY CROSS-EXAMINATION, AND (5) THE REASON WHY YOU BELIEVE THIS INFORMATION CANNOT BE PRESENTED BY DECLARATION OR OTHER DOCUMENT.

You should complete the form as fully and accurately as you can as quickly as you can and return it no later than 35 days after its having been mailed to you to the Commission's enforcement staff at the address:

**San Francisco Bay Conservation and Development Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, California 94102**

If you believe that you have good cause for not being able to complete this form within 35 days of its having been mailed, please complete it to the extent that you can and within 35 days of the mailing of the violation report send the statement of defense form completed as much as possible with a written explanation of what additional information you need to complete the form in its entirety, how long it will take to obtain the additional information needed to complete the form, and why it will take longer than 35 days to obtain the additional information, send all of this to the Commission's staff at the above address. Following this procedure does not mean that the Executive Director will automatically allow you to take the additional time to complete the form. Only if the Executive Director determines that you have shown good cause for the delay and have otherwise complete the form as much as is currently possible will be grant an extension to complete the form.

If the staff violation report/complaint that accompanied this statement of defense form included a proposed civil penalty, you may, if you wish, resolve the civil penalty aspect of the alleged violation by simply providing to the staff a certified cashier's check in the amount of the proposed fine within the 35-day time period. If you choose to follow this alternative, the Executive Director will cash your check and place a brief summary of the violation and proposed penalty along with a notation that you are choosing to pay the penalty rather than contesting it on an administrative permit listing. If no Commissioner objects to the amount of the penalty, your payment will resolve the civil penalty portion of the alleged violation. If a Commissioner objects to the proposed payment of the penalty, the Commission shall determine by a majority of those present and voting whether to let the proposed penalty stand. If such a majority votes to let the proposed penalty stand, your payment will resolve the civil penalty portion of the alleged violation. If such a majority does not let the proposed penalty stand, the Commission shall direct the staff to return the money paid to you and shall direct you to file your completed statement of defense form and all supporting documents within 35 days of the Commission's action. Of course, you also have the opportunity of contesting the fine from the outset by completing this form and filing it and all supporting documents within 35 days of its having been mailed to you.

If you have any questions, please contact as soon as possible **MAGGIE WEBER** or **JOHN BOWERS** of the Commission Enforcement Staff at telephone number **415-352-3600**.

1. Facts or allegations contained in the violation report that you admit (with specific reference to the paragraph number in the violation report):

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2. Facts or allegations contained in the violation report that you deny (with specific reference to paragraph number in the violation report):

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3. Facts or allegations contained in the violation report of which you have no personal knowledge (with specific reference to paragraph number in the violation report):

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4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any documents, photographs, maps, letters, or other evidence that you believe are relevant, please identify it by name, date, type, and any other identifying information and provide the original or a copy if you can):

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5. Any other information, statement, etc. that you want to make:

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6. Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this statement to support your answers or that you want to be made part of the administrative record for this enforcement proceeding (Please list in chronological order by date, author, title and enclose a copy with this completed form):

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7. Name of any person whose declaration under penalty of perjury was listed in the violation report as being part of the staff's case who the respondent wants to cross-examine, all documents about which you want to cross-examine the person, area or areas of information about which the respondent wants to cross-examine the witness, information that the respondent hopes to elicit in cross-examination, and the reason(s) why some other method of proving this information is unsatisfactory:

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# San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

<b>File:</b>	ER2014.015
<b>Permit:</b>	M1992.057
<b>Date Mailed:</b>	June 16, 2017
<b>35th Day After Mailing:</b>	July 20, 2017
<b>60th Day After Mailing:</b>	August 14, 2017
<b>Hearing Date:</b>	August 2017

**VIOLATION REPORT/COMPLAINT  
FOR THE IMPOSITION OF ADMINISTRATIVE CIVIL PENALTIES  
ENFORCEMENT INVESTIGATION NO. ER2014.015  
HERON BAY HOMEOWNERS ASSOCIATION**

**FAILURE TO RESPOND TO THIS VIOLATION REPORT/COMPLAINT FOR THE ADMINISTRATIVE IMPOSITION OF CIVIL PENALTIES BY COMPLETING THE ENCLOSED STATEMENT OF DEFENSE FORM AND ENCLOSING ALL PERTINENT DECLARATIONS UNDER PENALTY OF PERJURY, PHOTOGRAPHS, LETTERS, AND OTHER WRITTEN DOCUMENTS COULD RESULT IN A CEASE AND DESIST ORDER, A PERMIT REVOCATION ORDER, OR A CIVIL PENALTY ORDER BEING ISSUED TO YOU, OR A SUBSTANTIAL ADMINISTRATIVE CIVIL PENALTY BEING IMPOSED ON YOU WITHOUT YOUR HAVING AN OPPORTUNITY TO CONTEST THEM OR TO INTRODUCE ANY EVIDENCE.**

The San Francisco Bay Conservation and Development Commission is issuing this Violation Report/Complaint for the Administrative Imposition of Civil Penalties ("Violation Report/Complaint") and statement of defense form because the Commission's staff believes that you may be responsible for or involved with a possible violation of the Commission's laws and a Commission permit. The report contains a brief summary of all the pertinent information that staff currently has concerning the possible violation and reference to all the pertinent evidence on which the staff currently relies. All the evidence this Violation Report refers to is available in the permit and enforcement files for this matter located at the Commission's office. You can review these materials at the Commission's office or have copies made at your expense or both by contacting Greg Ogata of the Commission's staff at telephone number (415) 352-3600. This Violation Report/Complaint also informs you of the nature of the possible violations so that you can fill out the enclosed statement of defense form and otherwise be prepared for Commission enforcement proceedings.

Issuance of this Violation Report/Complaint and the enclosed statement of defense form is the first step in formal Commission enforcement proceedings. Subsequently, either the Commission or its enforcement committee may hold an enforcement hearing, and the Commission will determine what, if any, enforcement action to take.

Careful reading of and a timely response to these materials is essential to allow you to present your side of the case to the Commission. A copy of the Commission's enforcement regulations is also included so that you can fully understand the Commission's enforcement procedures. If you have any questions concerning either the Violation Report/Complaint, the enclosed statement of defense form, the procedures that the Commission and its enforcement committee follow, or anything else pertinent to this matter, you should contact, Maggie Weber or John Bowers of the Commission's staff at telephone number (415) 352-3600 as quickly as possible. Thank you for your cooperation.

**I. Entity believed responsible for the illegal activity:**

**Name:** Heron Bay Homeowners Association ("HOA")  
c/o Alan Berger, Representative  
**Address:** Law Offices of Alan Berger  
95 South Market Street, Suite 545  
San Jose, CA 95113  
**Telephone:** (408) 536-0500

**II. Brief description of the nature of the illegal activity:**

- A. Failure to submit and gain approval of public access plans for the Lewelling Boulevard Extension<sup>1</sup>, in violation of Special Condition II.A.1, Plan Review, BCDC Permit No. M1992.057.01 ("Citation Permit").
- B. Failure to provide the four BCDC public access signs as depicted on final approved plans for Shoreline Trail Segments 2 and 3, in violation of Special Condition II.A.2, "Conformity with Final Approved Plans," of the Citation Permit.
- C. Failure to permanently guarantee all public access areas, in violation of Special Condition II.F.2, "Public Access Permanent Guarantee," of the Citation Permit.
- D. Failure to provide required public access improvements<sup>2</sup>, in violation of Special Condition II.F.3.c, "Public Access Improvements," of the Citation Permit.
- E. Failure to maintain the interpretive signs located on Shoreline Trail Segment 3, required by Special Condition II.F.3 of the Citation Permit, in violation of Special Condition II.F.4, "Maintenance," of the Citation Permit.
- F. Failure to agree in writing that it has read, understood, and agrees to be bound by the conditions of the Citation Permit, in violation of Special Condition II.K, "Permit Assignment," of the Citation Permit.
- G. Placement of unauthorized restrictive signage on Bayfront Drive without a permit in violation of the permit requirement of Section 66632 of the McAteer-Petris Act.

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<sup>1</sup> The "extension of Lewelling Boulevard" is present day Bayfront Drive.

<sup>2</sup> A minimum 8-foot-wide paved path, with a minimum total of 4 feet of shoulder within the approximately 1,450-foot-long Lewelling extension.



### **III. Description of and location of property on which illegal activity occurred:**

The violations are located within and adjacent to Roberts Landing Slough, in the City of San Leandro, Alameda County (See Exhibit #1).

The project site is comprised of parcels identified as Alameda County Assessor Parcel Numbers (APNs) 080G-1406-029 and 080G-1406-028, both owned by Heron Bay Homeowners Association.

### **IV. Name of owner who controls property on which illegal activity occurred:**

Heron Bay Homeowners Association ("HOA")

### **V. Approximate date (and time if pertinent and known) illegal activity occurred:**

- A. The violation cited in Section II.A has persisted since the inconsistent public access was installed on Bayfront Drive in the late 1990's.
- B. The violation cited in Section II.B has persisted since December 31, 1998, when Amendment No. 1 to the Citation Permit required all authorized and required work to be completed.
- C. The violation cited in Section II.C, the failure to permanently guarantee all public access areas, in violation of Special Condition II.F.2, "Public Access Permanent Guarantee," of the Citation Permit, has persisted since September 4, 1994 because the Citation Permit required the public access to be dedicated within 60 days of July 6, 1994.
- D. The violation cited in Section II.D, the failure to provide required public access improvements, in violation of Special Condition II.F.3.c, "Public Access Improvements," of the Citation Permit, has persisted since December 31, 1997 because the Citation Permit required the public access improvements to be completed prior to December 31, 1997.
- E. The violation cited in Special Condition II.F has persisted since October 12, 1999 when the HOA assumed ownership of the property subject to the Citation Permit.
- F. The date of occurrence of the violations cited in Special Conditions II.E and II.G is unknown. Staff discovered these violations for the first time during an April 5, 2017 site visit.

### **VI. Summary of all pertinent information currently known to the staff in the form of proposed findings with references to all pertinent supporting evidence contained in the staff's enforcement file (the file is available at the Commission's office for your review; you should call the above listed staff enforcement officer to arrange to the review the file):**

- A. **Relevant Files.** This violation report/complaint is based on the following findings and the relevant San Francisco Bay Conservation and Development Commission (BCDC) files including:
  - 1. Permit File Nos. 1989.014.05<sup>3</sup> and M1992.057.01; and
  - 2. Enforcement File No. ER2014.015

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<sup>3</sup> Issued to the City of San Leandro.

**B. City of San Leandro Permit.**

1. On March 7, 1990, BCDC issued to the City of San Leandro Permit No. 1989.014.00 ("City Permit") to authorize activities at the San Leandro Municipal Marina and the Robert's Landing Area of the San Leandro Shoreline.
2. On October 1, 1991, BCDC issued to the City Permit Amendment No. 1989.014.01 to authorize fill removal in the Marina.
3. On April 15, 1994, BCDC issued to the City Permit Amendment No. 1989.014.02 to authorize the implementation of the City's Water Circulation and Drainage Plan to restore tidal action and enhance habitat in approximately 172 acres of Robert's Landing Area. As amended by this amendment, the Permit required a substantial public access trail network with improvements on the Robert's Landing area of the San Leandro Shoreline. The trail network is comprised of three trail segments that total an approximately 11,700-foot-long public access trail within an approximately 361,400-square-foot public access area that includes trail buffers and landscaping (See Exhibit #1).
4. As of April 15, 1994, when BCDC issued to the City, Permit Amendment No. 1989.014.02, the Heron Bay<sup>4</sup> residential development located southeast of the Shoreline Trail network did not exist; however, it was anticipated.

- C. Settlement Agreement.** On June 16, 1994, BCDC and Citation Homes Central<sup>5</sup> ("Citation") entered into the "Agreement Regarding Limits of Jurisdiction and Land Uses" ("Settlement Agreement") that established BCDC's jurisdiction for the purposes of Citation's development project, the future Heron Bay residential development (the common areas of which are now owned by the HOA), and the public access required to authorize the project.

Regarding jurisdiction, the parties agreed that:

*...the landward limit of BCDC's San Francisco Bay Jurisdiction, pursuant to Government Code Section 66610(a), is a line that is fifty feet bayward from, and that follows, the southwesterly boundary of the Roberts Landing property, from San Lorenzo Creek on the south to the extension of Lewelling Boulevard on the north. From there the limit of BCDC's Bay jurisdiction proceeds westerly such that no portion of the Citation property lying northerly of the Lewelling Boulevard extension lies within either BCDC's Bay Jurisdiction or its Shoreline Band jurisdiction. Thus, between San Lorenzo Creek and the Lewelling Boulevard extension, BCDC has Shoreline Band jurisdiction within the first 50 feet of the project.*  
(Section 1)

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<sup>4</sup> During the development stage, Heron Bay was called Robert's Landing.

<sup>5</sup> Heron Bay Homeowner's Association's predecessor in interest.

The Settlement Agreement provided that that Citation would provide public access improvements including grading, fill, and landscaping, located both within BCDC's Shoreline Band jurisdiction and within areas outside of BCDC's jurisdiction, as specified in their forthcoming BCDC Permit. Further, Citation agreed to permanently guarantee all required public access areas located on its property for such purposes. (Section 3)

- D. **Citation Permit.** On July 22, 1994, the BCDC issued Permit No. M1992.057 to Citation to authorize dredging and excavation activities to mitigate the impacts to public access that would result from the proposed Heron Bay development, consistent with the Settlement Agreement. The Citation Permit required Citation to provide certain public access improvements, consistent with the Settlement Agreement, including:
1. Special Condition II.A.1, Plan Review, required that no work could commence until final precise plans had been reviewed and approved in writing by or on behalf of BCDC.
  2. Special Condition II.F.2, Public Access Permanent Guarantee, required the public access areas described in Special Condition II.F.1 as Segment 2 and Segment 3 to be permanently guaranteed within 60 days of permit issuance.<sup>6</sup>
  3. Special Condition II.F.3, Public Access Improvements, required that prior to December 31, 1997, Citation would install:
    - a. A minimum 12-foot-wide, handicapped accessible, pedestrian and bicycle path, with a minimum 8-foot-wide, asphalt, primary use area and a minimum total of 4 feet of shoulder in Segment 1;
    - b. A minimum 12-foot-wide, handicapped accessible, pedestrian and bicycle crossing on top of the tide control structure in Segment 3;
    - c. A minimum of an 8-foot-wide paved path, with a minimum total of 4 feet of shoulder within Segment 2 and the Lewelling Boulevard extension to connect Lewelling Boulevard with the buffer area;
    - d. A seating area/overlook site to provide views of the East Marsh, with 4 benches and 4 trash cans;
    - e. Native upland vegetation planted in the buffer area that is suitable for wildlife habitat but landscaped to protect public views to the East Marsh from the public access path; and
    - f. No fewer than 4 public access signs, one at the beginning of each path on the site.

The pathway improvements were required to be developed in connection with the pathway improvements required in the City Permit.

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<sup>6</sup> The City Permit requires the City of San Leandro to permanently guarantee Segment 1 of the Shoreline Trail, though the Citation permit requires Citation to improve Segment 1.

4. Special Condition II.F.4, Public Access Maintenance, required all required areas and improvements, including walkways, signs, benches, landscaping, and trash containers to be permanently maintained by, and at the expense of, the permittee and assignees.
- E. Citation executed the Citation permit on July 12, 1994.
  - F. Pursuant to Amendment No. 1, issued on January 23, 1996, the Citation Permit required all work to be completed no later than December 31, 1998.
  - G. On May 7, 1996, Steve Foreman, Project Manager for the Heron Bay development, submitted on behalf of Citation plans ("public access plans") for public access signs, interpretive signs, and grading.  
  
The plans depicted locations for four BCDC public access signs at: (1) the entrance to the development along Lewelling Boulevard; (2) the eastern end of the trail near the Overlook Area; (3) the intersection of Shoreline Trail Segments 2 and 3; and (4) where the train enters the southwestern corner of the project site.  
  
The public access plan did not include the Lewelling Boulevard extension trail.
  - H. On May 13, 1996, BCDC approved Citation's public access plans.
  - I. Between 1996 and 2014, BCDC did not receive any correspondence regarding the Citation Permit. Meanwhile, on October 12, 1999, the HOA acquired the property and became successor to Citation under the Citation Permit; no formal assignment of the Citation Permit occurred and BCDC was not informed of the transfer of ownership to the HOA.
  - J. On April 10, 2014, San Francisco Bay Trail staff informed BCDC staff that the HOA was seeking approval from the City Planning Commission to construct gates and fencing at the entrance of Heron Bay development to control access for vehicles, bicyclists, and pedestrians into the residential development and in turn, to Bayfront Drive and Roberts Landing Slough, both of which are the public access areas required by the City Permit and the Citation Permit.
  - K. Upon receiving this report, BCDC staff determined that, if implemented, the proposal would require an amendment to the Citation permit because it would have discouraged members of the public from being able to reach the required public access areas. Further, no permanent guarantee had been recorded, as required by Special Condition II.F.2 of the Citation Permit.
  - L. By letter on June 12, 2014, BCDC, informed Cynthia Yonning, then HOA representative, that installation of the gate without first obtaining written authorization from BCDC through amending the Citation Permit would be a violation of the Citation Permit and BCDC's law. BCDC staff also informed Ms. Yonning that the legal instrument to guarantee the public access had never been submitted to BCDC and must now be prepared, approved by BCDC staff, and recorded. Staff established a voluntary period for the HOA to submit the draft instrument to BCDC staff by November 4, 2014, and for the

HOA to record an executed guarantee by March 1, 2015. Further, if either of the two deadlines were missed, staff stated it would commence the process for assessing standardized fines under section 11386 of the Commission's administrative regulations.<sup>7</sup>

- M. By letter dated June 13, 2014, Alan Berger, attorney representing the HOA, acknowledged the HOA's legal obligation as successor permittee under the Citation Permit to fulfill all as yet unfulfilled requirements of that permit, including but not limited to preparing and recording a public access permanent guarantee.
- N. On June 19, 2014, the City of San Leandro Planning Commission denied the HOA's application to install the security gates. On July 3, 2014, the HOA appealed the decision to the City Council who, on September 2, 2014, denied the appeal and upheld the Planning Commission's decision.
- O. In the course of a June, 2014, site visit, BCDC staff discovered the Bayfront Drive<sup>8</sup> sidewalk appeared to be an approximately five-foot-wide sidewalk within an approximately 12-foot-wide landscaped corridor, which did not comply with Special Condition II.F.3.c of the Citation Permit, which requires an eight-foot-wide paved path with four feet of shoulder.
- P. On November 13, 2014, BCDC staff met with Mr. Berger, Jeff Tepper, the gate consultant, and four HOA board members<sup>9</sup> to discuss the HOA's security concerns and the Citation Permit violations. During this meeting, the HOA explained that it wanted to install security gates<sup>10</sup> to address the recent increase in violent crimes in Heron Bay, which, in the opinion of the HOA, are crimes of opportunity committed by nonresidents freely entering the private streets of Heron Bay. BCDC staff suggested that a security kiosk without a gate, so long as it is accompanied by clear public access signage, would be more appropriate. The HOA verbally agreed to this alternative security strategy and inquired about how the HOA could resolve the violations. BCDC staff proposed that the HOA request authorization for the as-built site conditions on Bayfront Drive (after-the-fact) and new public access improvements consisting of bicycle sharrows and public shore parking as compensatory mitigation for the violations.
- Q. On January 7, 2015, the HOA again met with BCDC staff and proposed the following settlement package consistent with the discussions on November 13, 2014: (1) retain the as-built sidewalk and landscaping on Bayfront Drive; (2) provide a Class 3 bike lane including sharrows on Bayfront Drive; (3) modify the entrance at Lewelling Circle – located on City property - to include a drive through entry kiosk; (4) provide Bay Trail

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<sup>7</sup> Even though both dates were missed, staff did not commence the standardized fine assessment process. At this time, staff was unaware of the other violations to the Citation Permit, Settlement Agreement, and McAteer-Petris Act.

<sup>8</sup> Formerly referred to as the Lewelling Boulevard extension.

<sup>9</sup> Richard Brennon, Fred Simon, Brian Ritter, and Daryl Blagburn.

<sup>10</sup> Two of the three proposed gates were located outside of BCDC's jurisdiction and in areas not covered by the settlement agreement and did not impact or discourage public access.

access/way-finding signage per BCDC guidelines beyond that required by the Citation Permit; and (5) provide 10, daytime-only public shore parking spaces along Bayfront Drive. In response, while BCDC staff supported items 1, 2, 4 and 5, it expressed concerns that the kiosk proposal, if not accompanied by clear public access signage, could have a privatizing and thus discouraging effect on the public access required at the site. BCDC staff informed the HOA that local discretionary approval is necessary in order to file a permit amendment request.

- R. On May 28, 2015, the HOA submitted an application to the City for a security kiosk located in the public right-of-way encompassing the Lewelling Boulevard circle, on a parcel owned by the City.
- S. On July 17, 2015, BCDC staff wrote the HOA a letter reiterating its concerns about the security proposal involving a kiosk instead of a gate, and provided possible alternatives, including the placement of gates on the Bayfront Drive side streets that address residents' safety concerns without adversely affecting the existing required public access and do not require BCDC authorization. The letter reminded the HOA that in addition to the kiosk proposal, the legal instrument to guarantee the public access had not been submitted and the physical access improvements required by Special Condition II.F.3.c were still not in place; thus, the HOA is in violation of two Special Conditions of the Citation Permit. BCDC staff provided the HOA with 30 days to submit an application to amend its Permit to resolve these violations; otherwise Staff would commence the standardized fine assessment process.
- T. On August 4, 2015, the HOA asked for an extension of time from August 17<sup>th</sup> to September 17<sup>th</sup> to submit a permit amendment request. BCDC staff granted the HOA's request to extend the deadline by an additional 30 days to submit an amendment request.
- U. On September 17, 2015, BCDC staff received an application from Mr. Berger on behalf of the HOA to amend the Citation Permit requesting authorization to: (1) install and maintain BCDC public access signage on Bayfront Drive; (2) install bicycle sharrows along the roadbed of Bayfront Drive; (3) build an entry kiosk within the City-owned Lewelling Traffic Circle; (4) install "welcome signage" on entry kiosk and the approach; (5) install benches and trash receptacles in the public access area beyond what the Citation Permit already requires; and (6) install 15 daytime public shore parking spaces along Bayfront Drive.
- V. By letter dated October 15, 2015, BCDC staff informed the HOA that the application was incomplete pending the submittal of additional items, including but not limited to proof of adequate property interest and local discretionary approval because the proposed kiosk was to be located on property owned by the City.
- W. On January 4, 2016, the City of San Leandro denied the HOA's kiosk proposal for public health, safety and general welfare concerns.

- X. On May 26, 2016, after not having received a response to its October 15, 2015 letter, BCDC staff wrote to Mr. Berger, stating that after having worked with him, on behalf of the HOA, for over two years, to amicably resolve the violations with no success, BCDC staff was commencing the standardized fine assessment process.<sup>11</sup>

BCDC staff provided direction how to resolve both violations. For the failure to provide public access improvements on Bayfront Drive, the HOA could either: 1) obtain authorization for the as-built public access on Bayfront Drive and include new public access improvements to compensate the public for the absence of the required public access for many years; or 2) reconstruct the Bayfront Drive public access to be consistent with the Permit. For the failure to permanently dedicate the public access, the HOA was again directed to submit and gain staff approval of a legal instrument to dedicate the public access. Instructions for preparing an approvable legal instrument and a blank dedication form were enclosed with the letter.

In addition, BCDC staff recommended that the HOA submit a request to amend the Citation Permit to resolve the violations separately from, and in advance of, the desired amendment to install a security kiosk because, without the still-required local discretionary approval, the HOA would not be able to submit a complete application to BCDC, and waiting for such approval would stall resolution of the violations and, in turn, increase the accrual of standardized fines.

- Y. On July 13, 2016, Mr. Berger responded to the May 26<sup>th</sup> letter by submitting a request to amend the Citation Permit in one of three ways, with a stated preference for “Option 1”. “Option 1” requested authorization to retain the as-built public access (after-the-fact) in lieu of constructing the currently-required public access, construct a security kiosk with an attendant on HOA property, and provide new public access improvements consisting of bike sharrows, six signed public shore parking spaces and public shore signs at Bayfront Drive<sup>12</sup>.
- Z. On August 12, 2016, BCDC staff responded to Mr. Berger’s July 13<sup>th</sup> amendment request, focusing on the preferred “Option 1” and explained what the HOA needed to do in order to complete it:
1. Obtain local discretionary approval for the security kiosk;
  2. Provide more details about the proposed project including width of path, the purpose of the security kiosk and how the attendant would ensure the public is not impacted by its presence;

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<sup>11</sup> At this time, BCDC staff was only aware of two violations: failure to provide public access improvements on Bayfront Drive, in violation of Special Condition II.F.3.c, Public Access Improvements, and the failure to permanently guarantee the public access area, in violation of Special Condition II.F.2, Permanent Guarantee, of the Citation Permit.

<sup>12</sup> One of the public shore signs proposed at Bayfront Drive, in the HOA’s July 13<sup>th</sup> amendment application, is already required at this location and is absent, in violation of the Citation Permit (See Sections II.B and VI.G of this Violation Report).

3. Explain why only six public access parking spaces are proposed instead of the ten that were proposed in January 2015;
4. State the purpose of the license plate readers and provide a site plan that shows what the readers will look like, the quantity the HOA is proposing to install, specific locations the HOA is planning to install the readers, and explain how the HOA will ensure that the public will not be impacted by their presence;
5. Provide a site plan to show the location of the proposed bicycle sharrows;
6. Provide more information about the content and quantity of the public access signs;
7. Provide project plans with a vicinity map, site plan, property lines, and all proposed development;
8. Provide a signage plan;
9. Provide environmental documentation; and,
10. Provide a list of interested parties.

To date, BCDC staff has not received a response to this letter.

AA. On October 20, 2016, City of San Leandro Planning Commission forwarded a recommendation of approval for the proposed security kiosk to San Leandro City Council.

BB. On December 19, 2016, San Leandro City Council denied, without prejudice, the proposed security kiosk, in part, due to the clearly divided expression of views on the kiosk by Heron Bay residents present at the meeting. Although the proposal was supported by the HOA representatives, several Heron Bay residents and, therefore, members of the HOA, spoke in opposition of the proposed kiosk citing the expense of constructing, maintaining, and staffing it. Some residents voiced that it would be more cost effective to invest in surveillance cameras and license plate readers.

On December 21, 2016, BCDC staff emailed Mr. Berger to inform him that because San Leandro City Council did not approve the kiosk, the permit amendment application could not be filed as complete and would have to be either revised to remove the kiosk from the proposal or withdrawn. Mr. Berger acknowledged receipt of the email.

CC. On April 5, 2017, BCDC staff visited the site, with the Citation Permit and approved plans, and identified the violations cited in Sections II.A, II.B, II.E, II.F, and II.G of this Report.

DD. On April 14, 2017, after not receiving any communication from Mr. Berger (or the HOA), BCDC staff informed him by letter that the Executive Director had terminated the HOA's opportunity to resolve the penalty portion of the enforcement matter using the standardized fine process and a formal enforcement proceeding would be commenced.

EE. On May 15, 2017, Mr. Berger informed staff that he would submit a revised application to amend the permit and a draft permanent dedication instrument for the public access area by May 18, 2017.



FF. On May 19, 2017, BCDC staff received from Mr. Berger a third request for a second amendment to the Citation Permit in one of two ways, with a stated preference for “Option 1”. “Option 1” requested authorization to maintain the as-built public access on Bayfront Drive and install additional public access signage and multi-directional bicycle sharrows. The HOA requests to postpone the submittal of a draft permanent guarantee until 30 days after the amendment is issued, once the area to be dedicated as public access is finalized.

GG. On June 14, 2017, BCDC staff responded to Mr. Berger’s May 19<sup>th</sup> amendment application request, focusing on the preferred “Option 1” and explained what the HOA needed to do in order to complete it. Most of the information and materials necessary to file the application as complete were also identified and requested by staff in the August 12, 2016 letter that responded to the HOA’s second request for the second amendment to the Citation Permit, dated July 13, 2016. BCDC staff directed that in order to complete the amendment request the following information and materials were required:

1. Provide more details about the proposed project including the width of the as-built pedestrian path;
2. Provide project plans depicting the location of the proposed bicycle sharrows, the bicycle access lane, the public access signage;
3. Provide a signage plan including all signs that the HOA is already required to install, but has failed to do so, and proposed new signage; and
4. Provide a list of interested parties.

In regards to the outstanding permanent guarantee to dedicate required public access, BCDC staff stated that it agrees that it is appropriate to postpone submitting a draft document until the forthcoming amendment is issued since it will modify the required public access area.

**VII. Provisions of law or Commission permit that the staff alleges has been violated:** Section 66632. Permit for Fill, Extraction of Materials or Substantial Change in Use of Land, Water or Structure; Application for Permits.

Violations to the Citation Permit are identified in Section VII of this Report.

**VIII. If the staff is proposing that the Commission impose an administrative penalty as part of this enforcement proceeding, the amount of the proposed penalty:**

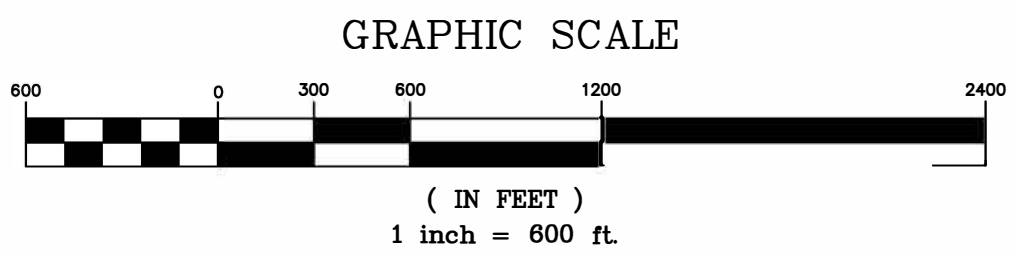
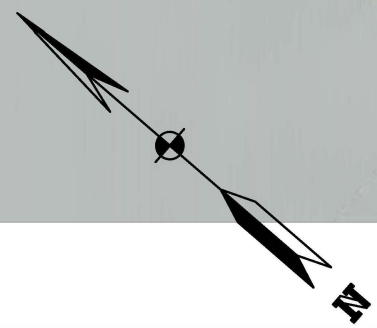
Staff proposes a penalty of \$159,000 (\$30,000 per violation cited in Sections II.A – II.D and II.F and \$4,500 per violation cited in Sections II.E and II.G of this report) under Section 66641.5(e) of the McAteer-Petris Act.

**IX. Any other statement or information that the staff believes is either pertinent to the alleged violation or important to a full understanding of the alleged violations:** Staff has provided all necessary information in the findings outlined in Section VIII above.






**X. List of staff exhibits:**

Staff Exhibit #1: Robert's Landing Area of the San Leandro Shoreline Public Access Site Map





## LEGEND

-  SHORELINE TRAIL SEGMENT 1 (CITY LANDS)
-  SHORELINE TRAIL SEGMENT 2 (CITY LANDS)
-  SHORELINE TRAIL SEGMENT 3 (CITY LANDS)
-  SHORELINE TRAIL SEGMENT 3 (STATE LANDS)
-  SIX 4-HOUR PUBLIC SHORE PARKING SPACES IN LEWELLING BLVD TRAFFIC CIRCLE



**STAFF EXHIBIT #1: ROBERT'S LANDING AREA OF THE SAN LEANDRO SHORELINE PUBLIC ACCESS SITE MAP**



# **Index of Documents Cited for Heron Bay Homeowners Association Permit Violation**

<b>Number</b>	<b>Date</b>	<b>Title/Description</b>
1.	May 18, 2016	BCDC Permit No. 1989.014.05 (Originally Issued March 7, 1990, as amended through May 2, 2016)
2.	June 22, 1994	Settlement Agreement Regarding Limits of Jurisdiction and Land Uses Between BCDC and Citation Homes Central
3.	July 6, 1994	BCDC Permit No. M1992.057 issued to Citation ("Citation Permit")
4.	May 7, 1996	Citation's Plans for Public Access Signs, Interpretive Signs, and Grading
5.	May 13, 1996	BCDC Letter Approving Steve Foreman's Plans
6.	April 10, 2014	BCDC Staff Violation and Investigation Report Form Re: Gate Installation and Public Access Restriction
7.	June 12, 2014	BCDC Letter to HOA Regarding Gate Installation
8.	June 13, 2014	Alan Berger's Letter Acknowledging HOA's Legal Obligation as Successor in Interest to Citation Permit and Intent to Provide Public Access Guarantee
9.	July 3, 2014	HOA Application for Appeal to San Leandro City Council
10.	June 25, 2014	Photographs of Bayfront Drive Sidewalk and Signage
11.	January 7, 2015	HOA Public Access Improvements Proposal
12.	July 16, 2015	City of San Leandro's Denial of HOA's Security Kiosk Proposal (Proposal Attached)
13.	July 17, 2015	BCDC Letter Regarding Security Kiosk
14.	September 17, 2015	Application from HOA – First Request for Second Amendment to Citation Permit
15.	October 15, 2015	BCDC Letter to HOA – Incomplete Application for Second Amendment to Citation Permit
16.	January 4, 2016	City of San Leandro Letter Denying HOA's Kiosk Proposal
17.	May 26, 2016	BCDC Letter to HOA – Commencement of Standardized Fines
18.	July 13, 2016	Application from HOA – Second Request for Second Amendment to Citation Permit
19.	August 12, 2016	BCDC Letter to HOA – Incomplete Application for Second Amendment to Citation Permit
20.	October 20, 2016	City of San Leandro Planning Commission Recommendation of Approval for Proposed Security Kiosk
21.	April 14, 2017	BCDC Letter Terminating HOA's Opportunity to Use the Standardized Fine Process and to Commence Formal Enforcement Proceeding
22.	May 19, 2017	Application from HOA – Third Request for Second Amendment to Citation Permit
23.	June 14, 2017	BCDC Letter to HOA – Incomplete Application for Second Amendment to Citation Permit